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ONE HUNDRED NINTH CONGRESS

# Congress of the United States

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**TO:** Members of the Subcommittee on the Federal Workforce and Agency Organization

**FROM:** Jon Porter, Chairman

**DATE:** Thursday, May 11, 2006

**RE:** Hearing entitled "*Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges.*"  
Tuesday, May 16, 2006  
2:00 p.m.  
Room 2247 Rayburn

Witnesses

**Panel 1:**

**Ms. Nancy Kichak**, Associate Director, Division for Strategic Human Resources Policy, Office of Personnel Management

**Panel 2:**

**Hon. William Cowan** (Deputy Chief Administrative Law Judge, Federal Energy Regulatory Commission), Vice President, Federal Administrative Law Judges Conference;

**Hon. Ronald G. Bernoski** (Administrative Law Judge, Social Security Administration), President, Association of Administrative Law Judges;

**Hon. R. Anthony McCann**, President of the Board of Contract Appeals Judges Association;

**Hon. Denise N. Slavin**, President, National Association of Immigration Judges

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## SUMMARY

This hearing will examine the concerns of non-Article III Judges, with an emphasis on Administrative Law Judges (ALJs). The Subcommittee will explore issues pertaining to the recruitment and retention of these judges including pay compression, the utility of implementing

pay-for-performance for non-Article III judges, OPM's management of the ALJ program, and the alleged inequity of retirement benefits provided to ALJs.

## BACKGROUND

Administrative Law Judges (ALJs), sometimes called *hearing officers* or *adjudicators*, are merit-appointed officers who perform specific judicial responsibilities for administrative agencies throughout the federal government. These judges make decisions, for example, on a person's eligibility for various Social Security or workers' compensation benefits, on protection of the environment, on the enforcement of health and safety regulations, on employment discrimination, and on compliance with economic regulatory requirements. ALJs are employed at 29 Cabinet-level and independent agencies; however, the vast majority of ALJs are employed by the Social Security Administration. ALJs are employed by selection from a roster of qualified candidates based on passage of a competitive test, legal experience, and judicial capability and temperament.

Approximately 1429 ALJs perform judicial services throughout the government, with about 1164 ALJs, or 81% total ALJ workforce, employed by the Social Security Administration, primarily to review routine disability appeals.

Rates of Basic Pay for Administrative Law Judge (ALJ) Positions	
Effective January 2006	
AL-1	\$143,000
AL-2	\$139,000
AL-3/F	\$132,000
AL-3/E	\$124,800
AL-3/D	\$117,400
AL-3/C	\$110,100
AL-3/B	\$102,700
AL-3/A	\$95,500

Rates of Pay for the Executive Schedule (EX)	
Effective January 2006	
Level I	\$183,500
Level II	\$165,200
Level III	\$152,000
Level IV	\$143,000
Level V	\$133,900

ALJs receive locality pay plus base pay, like most Federal employees. The combined base pay and locality pay of an ALJ is capped at Executive Level III (\$152,000).<sup>1</sup> ALJs are paid one of three levels of basic pay, designated AL-1, 2, and 3. Within AL-3 there are 6 rates of basic pay designated AL-3, rates A through F. Therefore, ALJs may receive one of eight rates of basic pay. Typically, the base pay of an ALJ starts at \$95,500 (AL-3/A), which is 66.7% of Executive Level IV, and increases to \$143,000 (AL-1), 100% of Executive Level IV (\$143,000), over a period of seven years.<sup>2</sup> The highest two levels of the AL schedule (AL-1 and 2) are

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<sup>1</sup> 5 U.S.C. § 5304

<sup>2</sup> By statute, the pay for AL-3/A cannot be less than 65% of Executive Level IV and the pay for AL-1 may not exceed Executive Level IV.

reserved for ALJ positions with “significant administrative and managerial responsibilities.”<sup>3</sup> For example, a Deputy Chief ALJ is usually paid at the AL-2 level (\$139,500), which is 97.5% of EL-IV and a Chief ALJ of a larger office is paid at the AL-1 level, which is 100% of EL-IV.

In addition, various boards and administrative courts throughout the federal government employ attorneys as administrative judges. Examples of these administrative boards and courts are the Immigration Courts within the Department of Justice, Executive Office of Immigration Review, and the Board of Contract Appeals within the Department of Energy.

Congress has also created several special courts under Article I of the Constitution which employ non-Article III judges.<sup>4</sup> These special courts include the U.S. Court of Appeals for the Armed Forces, the United States Tax Court, and the United States Court of Appeals for Veterans Claims.

**Comparison of the average pay of state judicial officials and ALJs**

Administrative Law Judges	\$140,698
Chief, Highest Court	\$134,788
Associate Justices, Court of Last Resort	\$130,328
Judges, Intermediate Appellate Courts	\$125,745
Judges, General Jurisdiction Trial Courts	\$117,328
State Court Administrators	\$116,347

ALJ Pay based on December 2005 OPM CPDF data. Salaries of state judges and administrative officials are from the National Center of State Courts, *Survey of Judicial Salaries*. (April 1, 2005)

**Comparison of the average pay of Federal judicial officials and ALJs**

Chief Justice of the United States	\$208,100
Associate Justices of the United States	\$199,200
Judges, U.S. Courts of Appeals	\$171,800
Judges, U.S. District Courts	\$162,100
Bankruptcy Judges and Magistrate Judges	\$149,132
Administrative Law Judges	\$140,698

ALJ pay based on December 2005 OPM CPDF data. Salaries of Federal judicial officials are based on 2005 data from the Congressional Research Service report titled *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, RL33245 (February 23, 2006).

## Issues of Concern:

### Pay Compression Among ALJs

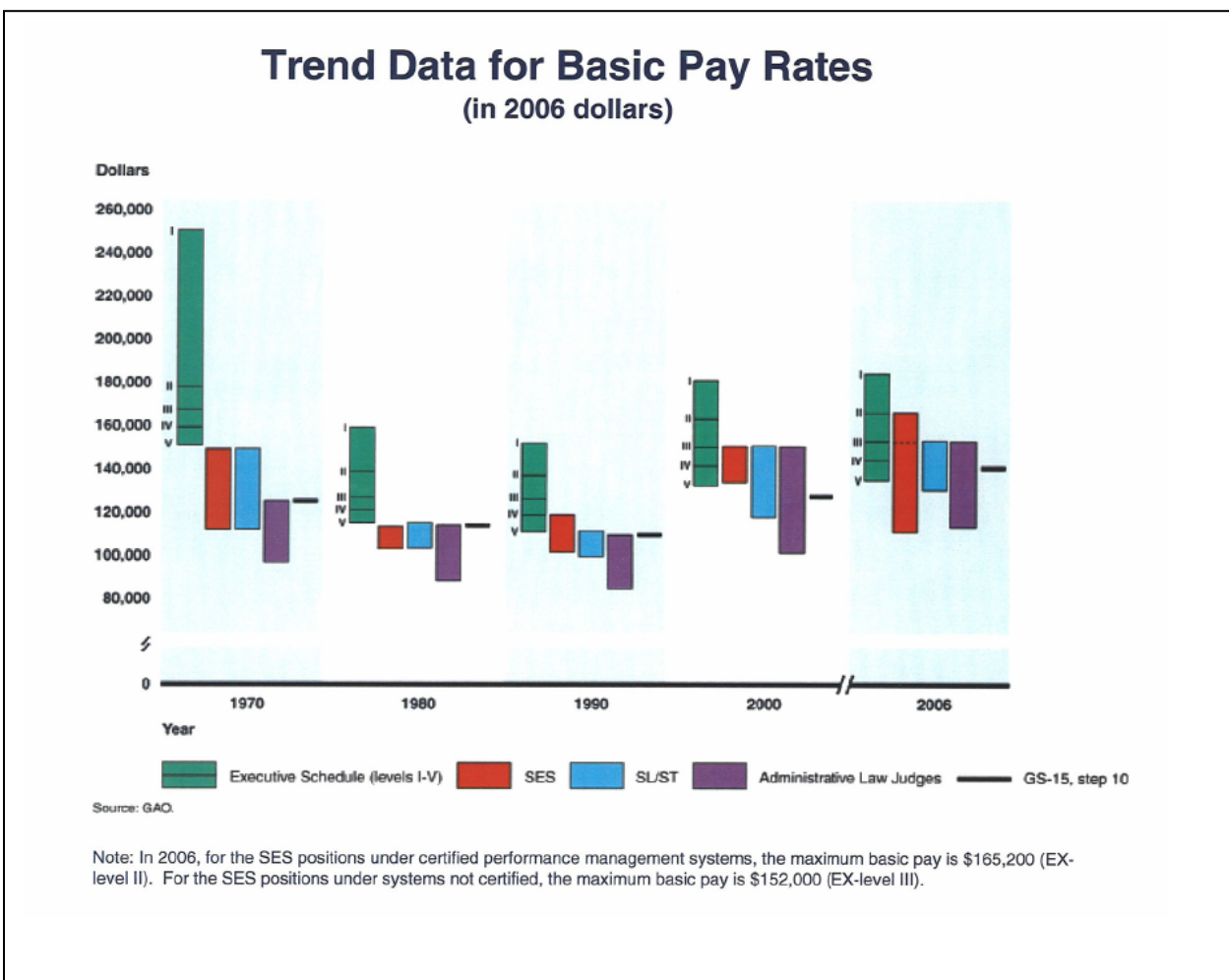
ALJs allege that pay compression is a significant problem in the ALJ community. Pay compression describes the phenomenon of ALJs being paid in a narrow range at or near the

<sup>3</sup> 5 CFR 930.210(d)

<sup>4</sup> The Supreme Court has long held that Congress can create “legislative courts” under authority outside of Article III. See *American Insurance Company v. Canter*, 26 U.S. 511 (1828); and *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929). However, in *Northern Pipeline v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), the Supreme Court discussed the limits on the authority of Congress to create courts outside of Article III. In *Northern Pipeline*, the Supreme Court addressed Congress’ broad grant of jurisdictional authority to bankruptcy judges in §241(a) of the Bankruptcy Reform Act of 1978. The Supreme Court held in a plurality decision that Article III bars Congress from establishing under its Article I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws and that the establishment of such courts does not fall within any of the historically recognized situations in which the principle of independent adjudication commanded by Article III does not apply. The Court noted that it had recognized three “narrow situations” in which courts could be created outside of Article III: (1) creation of courts in area lying exclusively outside the states, such as territories or the District of Columbia; (2) courts-martial; (2) or in situations where substantive legal rights are deemed “public rights.” *Northern Pipeline v. Marathon Pipeline Co.*, 458 U.S. 50, 62-72.

applicable pay cap (Executive Level III) due to the operation of the statutory pay cap. In the 108<sup>th</sup> Congress Representative Jo Ann Davis introduced H.R. 3737 to address pay compression among ALJs and the Subcommittee on Civil Service and Agency Organization held hearings on the bill.

Further, in the National Defense Authorization Act for Fiscal Year 2004, Congress created a new pay system for the SES with a higher cap, EL-II (\$157,000). In addition, an agency that obtains a certification from OPM that their SES “performance appraisal system...makes meaningful distinctions based on relative performance” is allowed to apply a pay cap equivalent to the total annual compensation payable to the Vice President (\$212,100 in FY 2006).<sup>5</sup> The National Defense Authorization Act for Fiscal Year 2004, however, did not address pay compression among the top levels of ALJs. ALJs believe that they should be paid at a rate that is comparable to the rate paid to the SES.



<sup>5</sup> 5 U.S.C. § 5307(d)

### **Pay for Performance**

ALJs oppose pay for performance. The position of the ALJ community is that because ALJs are responsible for hearing disputes over their employing agency's decision, their freedom from undue agency influence must be maintained to preserve their independence and remove any perception of impropriety. In the past, OPM has proposed that ALJs should be subject to pay for performance.

### **Enhanced Retirement**

ALJs support the enactment of the "Administrative Law Judges Retirement Act of 2005" (H.R. 1864). H.R. 1864 was introduced on April 26, 2005, by Representative Albert Wynn and was referred to this Subcommittee on May 4, 2005. The bill has 10 cosponsors. H.R. 1864 would establish new retirement eligibility criteria for ALJs. The bill includes provisions that would allow ALJs to (1) voluntarily retire after only 10 years of service at age 55 without an annuity reduction; (2) voluntarily retire on a reduced annuity at any age with only 10 years of service; (3) retire after only 5 years of service if involuntarily separated; and (4) receive an enhanced annuity computed under a formula that would be more generous than that provided to groups such as Members of Congress, law enforcement officers, firefighters, and nuclear materials couriers. H.R. 1864 would carry an enormous cost and create possible distortions that would provoke other groups of Federal employees to complain about inequitable favoritism. ALJs have not explained why these enhancements are needed to recruit, retain, or reward ALJs.

### **STAFF CONTACT**

If you have any questions regarding the markup please contact:

Chad Bungard, Deputy Staff Director and Chief Counsel 225-5147